The doctrine of conversion was of importance in England, before the Administration of Estates Act, 1925 because property might descend either to the heir-at-law or to the next-of-kin according as to whether there had been a conversion or not. In this Colony no question between the heir and the next-of-kin could ever arise, and the doctrine is only material in the matter of the construction of wills, where a testator has bequeathed his movable and immovable property to different persons. But even under the old law, in cases of contracts, it was essential that there should have been a contract which could have been enforced against the deceased. (*White & Tudor*, 9th ed., Vol. 1, p. 305). From this it follows that there must have been someone who could enforce the contract. In the case of the deceased's contract with Tan Peck Hood, even the builder could not enforce the contract — he could only — claim damages if the contract was broken. Neither the deceased's co-trustee nor the presumptive beneficiaries under the settlement could enforce the contract because they were not parties to it and in fact the deceased was the only person interested by virtue of his life estate and of his power of revocation. When the contract was made he was both the person liable on the contract and also entitled to the benefit of it, and the money which had not yet been spent was, therefore, in the words of Lord Eldon, "at home," *Wheldale* v. *Partridge*, 32 E.R. 341, and in such cases the person who held the money was, notwithstanding any contract or trust, deemed in law to hold it unconverted. It is quite clear, therefore, that even in England before 1925 the essential conditions upon which only would a Court of Equity have declared a conversion, were entirely lacking. The deceased might of course have bound himself for valuable consideration to carry out a contract on a stranger's land. Such a possibility is suggested by North J. in *Sprake* v. *Day*, [1898] 2 Ch. 510 at p. 513. In the present case the deceased's co-trustee might have entered into a contract upon a promise by the deceased to indemnify her or the deceased might have set aside the whole of the fund required for building the houses and declared himself a trustee of the fund for the benefit of the persons entitled under the settlement. In the one case the estate of the deceased would have been liable because of the contract to indemnify, and in the other because of the declaration of trust, but in neither case would the doctrine of conversion have had any bearing upon the matter whatever.

Mr. Mundell's arguments that the contract was an advancement or an imperfect gift are, I think, equally misconceived. It might be sufficient to point out that these arguments were never raised in the Court below, nor do they form part of the appellant's grounds of appeal, but on their merits the arguments are quite untenable. It should be pointed out that 'advancement' or 'imperfect gift' involve quite different principles of equity. As regards the doctrine of advancement, this arises when a property is purchased in the name of a stranger when there is generally a presumption that the person in whose name the property is purchased is a trustee for the person who paid the purchase money. In the case of a wife or child, however, the presumption is the other way, namely that the purchase is for the benefit of the person in whose name the purchase is made. The doctrine can apply where the transaction has actually been completed or where, as in *Drew* v. *Martin*, 71 E.R. 441 the contract could be specifically enforced. It obviously cannot apply to money that has not yet been advanced and where there is no binding contract which could be enforced. As regards the argument that the building contract was an imperfect gift, Courts of Equity are reluctant to construe an imperfect gift as a declaration of trust (*White & Tudor*, 9th ed., Vol. II, p. 806). As Turner L.J. said in *Milroy* v. *Lord*, 45 E.R. 1185 :—

> ".....I take the law of this Court to be well settled, that, in order to render a voluntary settlement valid and effectual, the settlor must have done everything, which according to the nature of the property comprised in the settlement, was necessary to be done in order to transfer the property and render the settlement binding upon him. He may of course do this by actually transferring the property to the persons for whom he intends to provide, and the provision will then be effectual and it will be equally effectual if he transfers the property to a trustee for the purpose of the settlement, [106] or declares that he himself holds it in trust for those purposes; and if the property be personal, the trust may, as I apprehend, be declared either in writing or by parol; but in order to render the settlement binding one or other of these modes must, as I understand the law of this Court, be resorted to, for there is no equity in this Court to perfect an imperfect gift. The cases, I think, go further to this extent, that if the settlement is intended to be effectuated by one of the modes to which I have referred, the Court will not give effect to it by applying another of those modes. If it is intended to take effect by transfer, the Court will not hold the intended transfer to operate as a declaration of trust, for then every imperfect instrument would be made effectual by being converted into a perfect trust. These are the principles by which, as I conceive, this case must be tried."

[106]

In this case the deceased clearly did nothing to shown an irrevocable intention to benefit the persons who might be entitled under the settlement. His intention may have been to revoke the settlement when the buildings were completed and benefit himself. He did not set aside a particular fund, he made no declaration of trust, and made no contract or agreement even with his co-trustee. In these circumstances equity will not intervene.

I would accordingly dismiss the appeal with costs. The deposit should be paid to the respondents or their solicitors on account of their taxed costs.

Appeal dismissed.

Solicitors : *Sisson & Delay; Allen & Gledhill.*

Re KAVENA HADJEE MOHAMED YOOSUF, DECD. (No. 2)

ESTATE & TRUST AGENCIES (1927) LTD. v. FATIMAH SHAM BINTE HADJI SAHIB & ORS.

[O.C.J. (Terrell J.) March 2, 1936]
[Singapore Originating Summons No. 66 of 1934]
[C.A. (Terrell J.) March 11, 1936]
[Singapore Civil Appeal No. 13 of 1935]

Courts Ordinance, 1934, s.27 — Civil Procedure Rules, 1934 — O.57, r.3 — O.57, r.18 — Powers of single Judge — Appeal against interlocutory order.

A single Judge sitting as the Court of Appeal can make any order that could be made by the full Court on an application for leave to appeal to the Privy Council (except an order giving leave to appeal against an interlocutory order) but this does not give a single Judge power to deal with an application to stay all proceedings in the action.

A single Judge has only the powers conferred on him by Ordinance or rule.

Every kind of judgment or order should be considered interlocutory in every case where the judgment or order does not finally determine the rights of the litigants.

MOTION.

In this case an administration action was commenced in which a common account was ordered, the accounting party being one A.M.S. Angullia. The accounts were taken by the Registrar in the ordinary way; and on the taking of the accounts a large number of items were falsified by the other parties concerned. A large group of these items consisted of payments made by the accounting party in the following circumstances. The testator in his lifetime executed a voluntary settlement of some immovable property which included vacant land. Thereafter the testator (in his lifetime) entered into a contract to build houses upon the land. The capital money thus being expended by him was paid out of his own monies and not out of the settled property. The testator made no provision in his will for the completion of the buildings and for the payments in respect thereof and after the death of the testator the accounting party as personal representative of the testator on his own responsibility and without applying to the Court for directions proceeded to carry out the contract and to make all the payments thereunder at the expense of the estate. The beneficiaries falsified all these payments. The Registrar referred the matter to the Judge and the reference came on for hearing in open Court when the Judge decided against the accounting party. The accounting party thereupon appealed to the Court of Appeal which upheld the judgment of the Court below. The proceedings on the reference to the Judge and in the Court of Appeal are reported at page 97 of this volume. The appellant being dissatisfied with the judgment of the Court of Appeal then sought to appeal to the Privy Council. He filed a petition applying for a certificate that the case was a fit one for appeal to His Majesty in Council. At the same time he also filed a motion applying for a stay of all the proceedings in the action pending hearing of the appeal to the Privy Council; and he also filed another motion to be heard one week later applying that his petition for appeal be heard by a single Judge. Both these applications were made in the month of February in Singapore. The next sitting of the Court of Appeal in Singapore would be held in June, 1936. It would have been possible to get the motion or the petition down for hearing before the Penang Court of Appeal but no attempt was made to do this. Accordingly both these applications were put in the list and came on for hearing at intervals of one week before a single Judge sitting as a Judge of the Court of Appeal, and in each case objections were taken to the application on the ground of irregularity. On the hearing of the motion for a stay.

[107] [107] *Battishill* for the appellant.

Walters for the administrators.

Laycock for first and second defendants, beneficiaries of the testator's estate.

Koek for the third defendant.

Mallal for the fourth and fifth defendants.

The arguments sufficiently appear from the judgment.

Cur. Adv. Vult.

Terrell J.: The sixth defendant was the executor under a will of the abovenamed Kavena Hadjee Mohamed Yoosuf, deceased which was subsequently declared void. Thereupon the present plaintiffs were appointed administrators and in these proceedings the sixth defendant has been called on to account for the assets which came into his hands while he acted as such executor. In the course of the taking of the accounts the Registrar referred to the High Court the question whether or not the sixth defendant was to be allowed to include two sums of $17,276 and $3,702.96 in his accounts. This reference came on for hearing before the Acting Chief Justice on the 8th October, 1935 and was on the 10th October, 1935 decided against the sixth defendant.

The sixth defendant appealed and by the order of the Court of Appeal dated the 18th January, 1936 the appeal was dismissed. The sixth defendant has now filed a petition for leave to appeal to the Privy Council and in the meantime the further consideration of the action is pending and on such further consideration it is inevitable that the judgment of the Court of Appeal confirming that of the Acting Chief Justice should be given effect to and accordingly the sixth defendant will be charged with the two sums above referred to unless he is in a position to make a claim for relief under the Trustees Ordinance or contribution against one or other of the beneficiaries. On the further consideration the question of his commission as executor will also arise for decision. The appellant argues that if this latter question is decided before the appeal to the Privy Council is heard, an order might be made which would not have been made if the appeal to the Privy Council were to succeed, and that after the hearing of the Privy Council appeal it would be too late to review any order which the High Court might have made on the subject. The appellant accordingly applies by motion that all proceedings under the originating summons may be stayed for two months, and that in the event of the appeal being admitted, the stay be continued until the hearing and determination of the Privy Council appeal.

The application is brought before the Court in its appellate jurisdiction and it is obvious that such jurisdiction can only be exercised by a single Judge if the Courts Ordinance expressly so provides. It is also clear that an application for stay must either be brought under a particular provision of the Rules and Orders or under the general jurisdiction of the Court. I think that it must be conceded that the general jurisdiction can only be exercised by the Court of Appeal when properly constituted, and the appellant, therefore, is in the position of having to satisfy the Court that the application falls under the special jurisdiction given by the Orders and Rules, and that such special jurisdiction can be exercised, in the circumstances of the case, by a single Judge.

The jurisdiction of a single Judge is given by section 27(3) of the Courts Ordinance, 1934, which reads as follows:—

> " Whenever the Court of Appeal is not sitting application for leave to appeal to His Majesty in Council from any final judgment or order may be dealt with by a Judge in any settlement, and any order that could be made by the Court of Appeal on such application may be made by a Judge: Provided that any order so made may be discharged or varied by the Court of Appeal and provided further that leave to appeal against an interlocutory order may be granted by the Court of Appeal only."

This sub-section re-enacts section 1156 of the Civil Procedure Code but with several important differences. Section 1156 reads as follows:—

> " Whenever the Court of Appeal is not sitting a petition for leave to appeal to His Majesty in Council from any final judgment or order may be dealt with by the Supreme Court in any settlement, and any order that could be made, or any certificate that could be issued, by the Court of Appeal upon or in consequence of such petition may be made or issued by the Supreme Court, provided that the certificate that an interlocutory order is a fit one for appeal referred to in section 1154 may be granted by the Court of Appeal only."

The important difference between the two provisions is as follows: Under the Civil Procedure Code "any order that could be made . . . . by the Court of Appeal upon or in consequence of such petition may be made.....by the Supreme Court," whereas under section 27(3) of the Courts Ordinance "any order that could be made by the Court of Appeal *on such application* may be made by a Judge." "On such application" can only refer to the application for leave to appeal, that is to say, the application for a certificate under Order 57, rule 3 that as regards amount, or value, or nature the case is a fit one for appeal to His Majesty in Council. The present application clearly does not fall under this description.

[108] [108] Even if, however, section 27(3) were given a similar interpretation to section 1156, there is still the difficulty of Order 57, rule 18 which provides for the powers of the Court pending an appeal to the Privy Council. It commences with the words *"Notwithstanding the admission of any appeal* the judgment or order appealed against shall be enforced unless the Court otherwise directs." The special jurisdiction therefore would only appear to arise after the admission of the appeal, and the present application being under the special jurisdiction is in any case premature.

The question whether or not the High Court will on the further consideration of the action deal with the appellant's commission as executor is entirely a matter for the High Court and is not a matter which I am called upon to decide, nor do I express any opinion upon the merits of the present application. I am satisfied, however, that for the reasons stated above I have, as a single Judge, no jurisdiction to entertain this application.

Application refused.

The appellant then proceeded with his motion to a single Judge sitting as the Court of Appeal to grant a certificate granting leave to appeal.

Battishill for the petitioner-appellant.

Walters for the respondents.

The facts and arguments sufficiently appear from the judgment.

Cur. Adv. Vult.

Terrell J.: The sixth defendant being desirous of appealing to the Privy Council against a judgment of the Court of Appeal dated the 18th January, 1936, has filed a petition praying for a certificate that the case is from its nature a fit one for appeal to His Majesty in Council [Order 27, rule 3(3)]. The right to appeal is given by section 27(1) of the Courts Ordinance, 1934, which provides that an appeal shall lie —

> (a) from any final judgment or order, provided that —
>
> (i) the amount or value of the subject matter of the action is two thousand five hundred dollars or upwards; or
>
> (ii) the matter in dispute on appeal to His Majesty in Council involves, directly or indirectly, some claim or question to or respecting property of like amount or value; or
>
> (iii) the case is from its nature a fit one for appeal, and
>
> (b) from any interlocutory judgment or order which the Court of Appeal considers a fit one for appeal to His Majesty in Council.

I take this to mean that where the appeal is from a final judgment or order and the case falls within sub-section (1)(a)(i) or (1)(a)(ii) there is an absolute right to appeal whereas if the case falls within sub-section (1)(a)(iii), it must be for the Court to decide whether or not the case is a fit one for appeal, and that accordingly the Court has a discretion whether to grant leave or not. The Court quite clearly also has a discretion whether or not to grant leave to appeal in the case of an interlocutory judgment or order [subsection (1)(b)].

The present application is, however, a motion to a single Judge made under the provisions of section 27(3) of the Courts Ordinance, 1934 and Order 57, rule 4, and the question arises whether in the circumstances of this case a single Judge has any jurisdiction to accede to the application. Section 27(3) gives a single Judge power to grant leave to appeal from any final judgment or order when the Court of Appeal is not sitting. The effect of this is that a single Judge can make the order to which the appellant is entitled if his case falls within section 27, subsection (1)(a)(i) or (ii), and has a discretion to make the order if the case falls within subsection (1)(a)(iii). It will be seen that the jurisdiction to grant leave is given to a single Judge only in the case of final judgments or orders, and the second *proviso* which expressly reserves to the Court of Appeal the jurisdiction to grant leave in the case of interlocutory orders is really superfluous. The *proviso* says nothing about interlocutory judgments, but such judgments are clearly not within the description of "any final judgment or order" in the earlier part of subsection (3) and the omission of "interlocutory judgments" from the *proviso* cannot be held to confer a jurisdiction which is not provided by the substantive part of the subsection.

The simple point then in this application is whether the judgment or order, the subject of the proposed appeal, is final or interlocutory.

During the course of the argument Mr. Walters for the respondents wished to address me on the subject of the exercise of my discretion in the event of my deciding that the order was a final order, but I expressed the opinion that if the order was final the right to appeal was absolute. My attention was not, however, called to the fact that the only ground stated in the petition is "that the case is from its nature a fit one for appeal," and as the appellant has elected to proceed under subsection (iii) instead of (ii), I think that the Court might have discretion, and I should have been prepared to hear further argument on the subject. As, however, I have come to the conclusion that the order appealed from is interlocutory, and that I have no jurisdiction to deal with
[109] the application, the [109] question of the exercise of my discretion does not arise.

The question as to whether an order is final or interlocutory has been the subject of numerous decisions in England. The point is of importance in three cases:

(1) under English Order 58, rule 3 where the notice of appeal in case of a final order is a 14 days' notice, whereas in the case of an interlocutory order it is a 4 days' notice;

(2) under English Order 58, rule 15 where the time within which an appeal must be brought, is within 6 weeks, in the case of a final order, and within 14 days in the case of an interlocutory order; and

(3) under the Judicature Act, 1925, section 31, subsection (1)(i) where the leave of the Judge or of the Court of Appeal is required in the case of an appeal against an interlocutory judgment or order.

The authorities collected in the *Annual Practice* appear to refer exclusively to questions arising under (1) and (2) which are not necessarily decided according to the same principles and an application under (3) and which further do not appear to provide an entirely consistent *ratio decidendi.*

As I have said, no cases are cited in the *Annual Practice* as to what orders are interlocutory for the purpose of requiring leave, and in any case all the authorities deal only with appeals from the High Court to the Court of Appeal, and are not therefore strictly in point in considering whether an order of the Court of Appeal in the Straits Settlements is interlocutory for the purpose of an appeal to the Privy Council.

For this purpose the question must be considered from a different angle, bearing in mind the object which the legislature presumably had in view. In England the Court of Appeal is always sitting, and appeals from an interlocutory order can be brought within a month or even less, the same counsel can be engaged, and the cost of such an appeal is relatively small. In a Colony such as the Straits Settlements quite different considerations arise. The expense of an appeal to the Privy Council is necessarily heavy, solicitors have to be engaged in London, counsel instructed, and the record prepared and presented. The delay in obtaining a decision is also great, and in some cases may extend to two years. Bearing these considerations in mind, I would infer on principle that it was intended that the leave of the Court should be required in every case where the judgment or order did not finally determine the rights of the litigants, and that any other kind of judgment or order should be considered interlocutory. Adopting this principle, it appears to me, in the words of Brett L.J. in *Standard Discount Co.* v. *La Grange,* 3 C.P.D. 71 that "no order, judgment or other proceeding can be final which does not at once affect the status of the parties for whichever side the decision be given."

The order from which the present appellant decides to appeal is in effect a direction to the Registrar given in the course of an inquiry directed by the High Court. It is not even the further consideration of the action. It has been held in England that though an order on further consideration is a final order, an order on an application to vary a certificate is an interlocutory order even though the two orders happen to appear on the same piece of paper; see *per* Jessel M.R. in *Cummins* v. *Herron,* 4 Ch. D. 787 at p. 789. The order appealed from is merely an order for the purpose of working out the rights given by a previous order, and in questions arising under English Order 58, rule 15 such orders are always regarded as interlocutory [*Blakey* v. *Latham,* 43 Ch. D. 23; and *Norton* v. *Norton,* 99 L.T.R. 709]. In a matter of this kind the interests of the beneficiaries, the extent of the trust funds and the unavoidable delay in bringing the litigation to an end may all influence the Court of Appeal in deciding whether or not the sixth defendant should be allowed to prefer his appeal to the Privy Council, and it is proper that in a matter which does not finally dispose of the litigation the Court of Appeal should be in a position to consider whether in the interests of justice the appellant should have leave to appeal.

In the view I take of section 27(3) of the Courts Ordinance, 1934, it might well be that certain orders which in England are regarded as final for the purpose of determining the length of notice, might nevertheless be treated as interlocutory for the purpose of section 27(3). Where, however, orders similar to the order the subject of the present application, have been treated as interlocutory in England, it appears to me that *a fortiori* such orders must be treated as interlocutory for the purpose of an appeal to the Privy Council.

The motion must therefore be refused with costs.

Motion refused.

Solicitors: *Sisson & Delay; Allen & Gledhill; Braddell Bros.; Chan & Eber; Mallal & Namazie.*

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[110] OVERSEA CHINESE BANKING CORPORATION LTD. v. THE FIRM OF YAIK JOO ANN [110]

[O.C.J. (Terrell J.) April 1, 1936]

[Singapore Suit No. 129 of 1936]

Civil Procedure Rules, 1934, O.3, rr.5 and 6 — Claim in foreign currency.

When a statement of claim is endorsed upon a specially endorsed writ in respect of the amount due upon a foreign judgment, the claim should be expressed in S.S. currency; and it should show the amount in S.S. currency which is the equivalent of the amount of the foreign currency due on the foreign judgment, calculated as on the date when the foreign judgment was obtained.